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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ASSESSMENT APPEALS SERVICES LLC, Plaintiff and Appellant, v. FARHAD FARAHMAND et al., Defendants and Respondents.	B282527 (Los Angeles County Super. Ct. No. BC455466)

APPEAL from judgment of the Superior Court of Los Angeles County, Holly E. Kendig, Judge. Affirmed.

McAllister Glover, Jon-Rene M. Glover, for Plaintiff and Appellant.

Vivoli Saccuzzo, Jason Saccuzzo, for Defendants and Respondents.

Plaintiff and appellant Assessment Appeals Services LLC (plaintiff) appeals from a judgment in favor of defendants and respondents Farhad Farahmand and Umbrian Properties LLC (defendants), entered after the court dismissed the case under Code of Civil Procedure section 583.310.[1] Plaintiff contends the trial court erred in concluding that the five-year limitations period for bringing a case to trial was not tolled or extended by a written or oral stipulation between the parties, or tolled because of impossibility, impracticability, or futility. The record on appeal does not support plaintiff's contentions of error, and we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff filed a lawsuit against defendant on February 18, 2011, seeking payment for property tax reduction services. The parties engaged in discovery and prepared for a November 2012 trial. In March 2012, defendants deposed

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[1] All subsequent statutory references are to the Code of Civil Procedure unless otherwise indicated.

Ramin Salari[2] seeking communications between Salari and John Noguez, the Los Angeles County Assessor. Salari refused to answer questions about such communications, asserting his right against self-incrimination under the Fifth Amendment to the United States Constitution. In October 2012, the district attorney filed a felony complaint against Salari and others, charging Salari with multiple crimes, including bribery and misappropriation of public funds.

On November 26, 2012, defendants filed a bench brief arguing that plaintiff was not entitled to a stay based on the criminal case. At the November 28, 2012 final status conference, plaintiff's counsel advised the court that the preliminary hearing in Salari's criminal case was set for January 2013. The court scheduled a trial setting conference in the civil case for August 28, 2013, specifying that discovery remained open. The minute order further stated, "Both sides shall meet and confer re: discovery. The Court notes if a formal hearing re: discovery is necessary, either side may contact this court to set up a status conference." The record on appeal contains no reporter's transcript or suitable substitute for this or any other hearing.

On August 28, 2013, the parties advised the court that the criminal action was still pending, and no trial date had been set. According to the minute order in the civil case,

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[2] Salari appears to be plaintiff's principal; he was named as a cross-defendant in the current litigation, but is not a party to this appeal.

"Both counsel stipulate to having the court stay this case for 6 months, pending the outcome of the criminal case. [¶] Pursuant to the above stipulation by counsel, the court orders this case stayed until March 5, 2014." The court continued the status conference.

In February 2014, counsel exchanged e-mails in which they agreed to stay the proceedings and continue the status conference for six months. When defendants' counsel gave plaintiff's attorney the option of drafting a proposed stipulation or doing an oral stipulation at the upcoming hearing, plaintiff's counsel responded, "We'll just do it orally at the hearing." The court's March 5, 2014 minute order made no mention of a stay, but continued the status conference to September 5, 2014. In September, the court continued the status conference to April 8, 2015, again with no mention of any stay.

The minute order for the April 8, 2015 status conference stated, "This matter was stayed pending the resolution of the criminal matter. Counsel inform the court that this case will proceed regardless of the outcome in the criminal matter." The court continued the status conference to February 9, 2016, and advised, "The parties can call the clerk to move up the status conference date if the criminal matter is resolved sooner."

Defense counsel did not appear at the status conference on February 9, 2016. Plaintiff's counsel informed the court that no preliminary hearing was scheduled in the criminal case, and the court ordered, "The [criminal] matter

will not affect whether this matter goes to trial. The court will go forward with this matter. [¶] The stay on this matter is ordered lifted as of this date. Discovery is reopened." The court scheduled a trial setting conference for April 27, 2016, and ordered plaintiff to give notice. On March 2, 2016, plaintiff filed a document titled "Notice of trial setting conference and notice of lifting of stay" that provided notice of the scheduled trial setting conference and also stated, "[Please take further notice that] the court has lifted the stay of the matter. The parties may proceed with preparation for Trial, including conducting discovery."

At the April 27, 2016 trial setting conference, the court scheduled a final status conference for November 18, 2016, with trial documents due by November 11, 2016. The jury trial was scheduled for November 28, 2016, with a three- to four-day time estimate. The minute order also stated, "The court would like the parties to figure out the time left before this case hits the five year mark."

On November 18, 2016, defendants brought a motion under section 583.310, seeking judgment on the pleadings based on plaintiff's failure to bring the action to trial within five years. After additional briefing and a hearing,[3] the

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[3] Plaintiff filed an opposition on November 30, 2016. Defendants filed a reply on December 6, 2016. Both the opposition and reply briefs state the hearing date for defendants' motion for judgment on the pleadings as December 19, 2016, but the record on appeal does not contain a reporter's transcript or a minute order for that

court granted defendants' motion. The court reasoned that even if it assumed a stay was in place during the period from August 28, 2013, through March 5, 2014, tolling the five-year period for a little over six months, the case would have been pending for five years on or about August 18, 2016. The court explained that "the only way to extend the five-year deadline by mutual agreement is with a written stipulation or by oral agreement made in open court that explicitly refers to the five-year statute itself. CCP §583.330. The court has been provided with no evidence of such agreement here. Therefore, even if the 6-month 'stay' applies, the five-year statute has run, and the court must grant the defendant's motion for judgment on the pleadings." The court also found, based upon its review of all the relevant minute orders "that no stay was pending after March 5, 2014." The court clarified that the statement regarding lifting of a stay and reopening of discovery in its earlier February 9, 2016 minute order was essentially incorrect, because "there was no existing stay to be lifted."[4] The court also found that plaintiff "did not demonstrate a

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date. Both parties filed additional briefing and declarations on January 4, 2017. The court issued its written decision on January 18, 2017.

[4] The court noted that on February 9, 2016, plaintiff's counsel informed the court that the criminal case would not affect the trial and that the court should lift the stay and reopen discovery. The court explained that "No opposing counsel was present to contradict that information, which then was included [in] the minute order."

circumstance of impossibility, impracticability, or futility causing the delay in bringing the case to trial . . . ."

The court entered judgment in favor of defendants, and plaintiff timely appealed.[5] On February 15, 2018, this court directed the parties to brief whether plaintiff's failure to provide a reporter's transcript or suitable substitute warrants affirmance based on inadequacy of the record.

DISCUSSION

The question before us is whether the trial court erred in rejecting plaintiff's argument that part of the five-year, nine-month period between the filing of plaintiff's complaint and defendants' motion seeking dismissal fell within one of the statutory exceptions to the five-year limitations period for bringing a case to trial.

The record establishes that plaintiff filed its complaint on February 18, 2011; therefore, the five-year period for bringing a case to trial would expire on February 18, 2016, unless plaintiff could show the running of the five-year time period was extended by the parties under section 583.330 or tolled under section 583.340. Defendants filed their motion

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[5] Plaintiff filed a subsequent appeal from a later order awarding attorney fees to defendants. This court denied plaintiff's motion to consolidate the two appeals and extend the time to file an opening brief. (Apr. 19, 2018, B282527.) The later appeal was dismissed for failure to file an opening brief. (June 28, 2018, B286338.)

for judgment on the pleadings nine months later, on November 18, 2016.

Plaintiff contends the case was stayed by either a written stipulation or an oral agreement between the parties. Plaintiff also argues that the court erroneously rejected its argument that it was impractical to bring the case to trial within the five-year period. We reject each of plaintiff's arguments.

Statutory scheme

"An action shall be brought to trial within five years after the action is commenced against the defendant." (§ 583.310.) An action which is not brought within the prescribed period must be dismissed upon defendant's motion unless plaintiff demonstrates an extension, excuse, or exception "as expressly provided by statute." (§ 583.360, subd. (b); *Gaines v. Fidelity National Title Ins. Co.* (2016) 62 Cal.4th 1081, 1090 (*Gaines*).) Parties may agree to "extend the time within which an action must be brought to trial," so long as the agreement meets certain statutory criteria. (§ 583.330.) The five-year time frame can also be tolled when a court finds any of the following circumstances: "(a) The jurisdiction of the court to try the action was suspended. [¶] (b) Prosecution or trial of the action was stayed or enjoined. [¶] (c) Bringing the action to trial, for any other reason, was impossible, impracticable, or futile." (§ 583.340.)

According to the California Legislature, "It is the policy of the state that a plaintiff shall proceed with reasonable diligence in the prosecution of an action but that all parties shall cooperate in bringing the action to trial or other disposition. Except as otherwise provided by statute or by rule of court . . . , the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy that requires dismissal for failure to proceed with reasonable diligence in the prosecution of an action . . . ." (§ 583.130.)

Standard of review

The trial court's interpretation of parties' stipulations and the statutory requirements for extensions or tolling of the five-year period is subject to de novo review. (*Munoz v. City of Tracy* (2015) 238 Cal.App.4th 354, 358 (*Munoz*).) "'The question of impossibility, impracticability, or futility is best resolved by the trial court, which "is in the most advantageous position to evaluate these diverse factual matters in the first instance." [Citation.] The plaintiff bears the burden of proving that the circumstances warrant application of the . . . exception. [Citation.] . . . The trial court has discretion to determine whether that exception applies, and its decision will be upheld unless the plaintiff has proved that the trial court abused its discretion. [Citations.]' [Citation.] Under that standard, '[t]he trial

court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' [Citation.]" (*Gaines*, *supra*, 62 Cal.4th at p. 1100, fn. omitted.)

Section 583.330—Extension of five-year limitations period

The record on appeal does not support plaintiff's argument that the parties agreed to extend the five-year limitations period for enough time to avoid dismissal. An agreement between the parties to extend the limitations period must be memorialized either by a written stipulation or by an oral agreement made in open court as reflected in a court transcript or the court's minutes. (§ 583.330.) A written stipulation "need not be filed but, if it is not filed, the stipulation shall be brought to the attention of the court if relevant to a motion for dismissal." (§ 583.330, subd. (a).) A written stipulation must either include an express waiver of the right to dismiss under section 583.310 or must continue the trial to a specific date outside the five-year period. (*Munoz*, *supra*, 238 Cal.App.4th at pp. 360–361.) "Stipulations that merely extend the time for trial within the five-year period, absent a showing that the parties intended otherwise, will not extend the five-year period. [Citations.]" (*J. C. Penney Co. v. Superior Court of Fresno County* (1959) 52 Cal.2d 666, 669 (*J.C. Penney*) [interpreting a prior version

of the statute only permitting extensions by written stipulation]; see also *Miller & Lux Inc. v. Superior Court* (1923) 192 Cal. 333, 337–338 (*Miller*) [a stipulation extending the statutory period does "not operate as a waiver for all future time of the right of defendants to a dismissal after the expiration of the extended period"]; *Munoz*, *supra*, 238 Cal.App.4th at pp. 360–361 [differences between prior and current versions of statute governing extensions of the statutory period by stipulation do not preclude reliance on cases interpreting prior version].)

Plaintiff argues that the February 2014 e-mail exchange between the parties was a written stipulation under section 583.330, subdivision (a), to extend—either for six months or indefinitely—the deadline to bring the case to trial.[6] Plaintiff's argument contradicts the substance of the exchange, in which the parties agreed to stay the

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[6] The e-mail exchange is brief, so we excerpt the substantive language, omitting signature blocks and e-mail envelope information. Defendant's attorney begins the exchange, "John, [¶] What is the status of the criminal matter? We have a status conference next week. What would you propose we do?" Plaintiff's attorney responds, "The case is still pending. Let's stipulate to stay the proceedings and continue the status conference 6 months out." Defendant's attorney: "Okay – send over a proposed stip or we can just do it orally at the hearing. I'm planning on making a telephonic appearance." Plaintiff's attorney: "We'll just do it orally at the hearing." Defendant's attorney: "Ok."

proceedings and continue the status conference for six months, but made no mention of section 583.330 or the five-year deadline for bringing a case to trial. In fact, plaintiff's attorney declined to prepare a written stipulation, opting instead to present the stipulation orally in court. Without any mention of section 583.330 or the five-year deadline for bringing a case to trial, the e-mails are insufficient to satisfy the requirements for a written stipulation under section 583.330, subdivision (a). (*Munoz*, *supra*, 238 Cal.App.4th at pp. 360–361; *J.C. Penney*, *supra*, 52 Cal.2d at p. 669.)

Plaintiff also argues that the parties extended the five-year limitations period by oral agreement under section 583.330, subdivision (b). That subdivision requires an "oral agreement made in open court, if entered in the minutes of the court or a transcript is made." (§ 583.330, subd. (b).) Plaintiff has not provided any reporters' transcripts, so the only way to show an oral agreement in open court is through the court's minute orders. The court's August 23, 2013 minute order establishes that the parties stipulated to stay the case for six months, until March 5, 2014. The minute order makes no mention of section 583.330 or the five-year deadline for bringing a case to trial . None of the remaining minute orders reflect any agreement by the parties to extend the five-year deadline or the initial six-month stay.

Plaintiff argues that two subsequent minute orders—on April 8, 2015, and February 9, 2016—constitute evidence of an oral agreement between the parties to extend the six-month stay. We disagree. The April 8, 2015 minute order

states, "This matter was stayed pending the resolution of the criminal matter. Counsel inform the court that this case will proceed regardless of the outcome of the criminal matter." The order's language does not specify the length of the prior stay, or whether it was based on the parties' agreement. The February 9, 2016 minute order suffers the same deficiency, simply stating, "The stay on this matter is ordered lifted as of this date." Neither order satisfies the requirements of section 583.330, subdivision (b), and so the court correctly determined that plaintiff did not provide evidence of an agreement between the parties to extend the five-year limitations period.

Section 583.340, subdivision (c)—Tolling of five-year period by impracticability

Plaintiff contends that the five-year period was tolled under section 583.340, subdivision (c), because the delays in the criminal proceeding were outside plaintiff's control.[7] Plaintiff has not demonstrated error.

It is the burden of the appellant to produce an adequate record demonstrating trial court error. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574–575; *Baker v. Children's*

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[7] On appeal, plaintiff does not argue, as it did in the trial court, that section 583.340, subdivision (b) provides a basis for tolling. That subdivision provides that the five-year period is tolled when "Prosecution or trial of the action was stayed or enjoined."

Hospital Medical Center (1989) 209 Cal.App.3d 1057, 1060.) Without a record of the oral proceedings, we cannot determine whether the trial court abused its discretion in concluding that "plaintiff did not demonstrate a circumstance of impossibility, impracticability, or futility causing the delay in bringing the case to trial . . . ." In the absence of a contrary showing, we presume the trial court acted appropriately. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 186–187; *Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483 ["In many cases involving the substantial evidence or abuse of discretion standard of review, . . . a reporter's transcript or an agreed or settled statement of the proceedings will be indispensable"]; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296 [to overcome presumption on appeal that an appealed judgment or order is presumed correct, appellant must provide adequate record demonstrating error].)

Even if we considered the merits of plaintiff's argument on appeal, we find no abuse of discretion. In determining whether a plaintiff has shown impossibility, impracticability, or futility, "courts have focused on the extent to which the conditions interfered with the plaintiff's ability to 'mov[e] the case to trial' during the relevant period. [Citations.]" (*Gaines*, *supra*, 62 Cal.4th at p. 1101.) "A plaintiff has an obligation to monitor the case in the trial court, to keep track of relevant dates, and to determine whether any filing, scheduling, or calendaring errors have occurred. This obligation of diligence increases as the five-

year deadline approaches." (*Jordan v. Superstar Sandcars* (2010) 182 Cal.App.4th 1416, 1422; see also *De Santiago v. D & G Plumbing, Inc.* (2007) 155 Cal.App.4th 365, 371 [impracticability exception "makes allowance for circumstances beyond the plaintiff's control, in which moving the case to trial is impracticable for all practical purposes"].)

Based on defendants' November 2012 bench brief, plaintiff was aware there was no legal impediment to moving forward with the civil case. In April 2015, ten months before reaching the five-year mark, counsel for both parties informed the court that the case would "proceed regardless of the outcome in the criminal matter." There is no evidence that plaintiff's counsel sought an expedited trial date within the five-year period, or that counsel even alerted the court to the impending deadline to bring the case to trial. Under these circumstances, we conclude the trial court did not abuse its discretion in granting defendant's motion based on the finding that plaintiff failed to establish that bringing the action to trial was "impossible, impracticable, or futile." (§ 583.340, subd. (c); *Jordan v. Superstar Sandcars*, *supra*, 182 Cal.App.4th at p. 1422.)

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendants and respondents Farhad Farahmand and Umbrian Properties LLC.

MOOR, J.

WE CONCUR:

RUBIN, P. J.

BAKER, J.